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No. 80-528

In the Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES J. SAVARESE, JR., PETITIONER

v.

PATRICIA ROBERTS HARRIS,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether disclosure of information regarding petitioner's work history, which was contained in a "system of records" not relied upon as the source of the information, falls within the scope of the Privacy Act, 5 U.S.C. 552a.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Case:

Smiertka v. *United States Dep't of Treasury*, 447 F. Supp. 221, remanded, 604 F.2d 698 5

Statutes and rule:

Privacy Act of 1974, 5 U.S.C. 522a *et seq.*:

5 U.S.C. 522a 3
5 U.S.C. 552a(a)(4) 5
5 U.S.C. 552a(a)(5) 5, 7
5 U.S.C. 552a(b) 5, 6, 7

Pub. L. No. 93-579, 88 Stat. 1896:

Section 2(a)(2) 7
Section 2(a)(3) 7

Fed. R. Civ. P. 41(a)(1)(ii) 4

Miscellaneous:

40 Fed. Reg. 28953 (1975) 7

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A) is reported at 620 F.2d 298. The opinion of the district court (Pet. Supp. App. 1–16) is reported at 479 F. Supp. 304.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1980. The petition for a writ of certiorari was filed on September 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a medical doctor, was a commissioned officer in the United States Public Health Service, Department of Health and Human Services, until his appointment was terminated in mid-summer 1977. During petitioner's duty period, his superior officer was Dr. George A. Reich, Regional Health Administrator for Region IV in Atlanta. The controversy in this case concerns a telephone conversation between Dr. Reich and petitioner's then-prospective employer disclosing petitioner's unfavorable employment record and a subsequent letter memorializing that telephone conversation.

1. In 1976, when petitioner was stationed at a Health Service clinic in South Carolina, a disagreement arose between petitioner and his supervisors concerning petitioner's alleged absences from his duty station and his conduct of an off-duty medical practice without proper authorization (Pet. Supp. App. 2; Reich Aff. 2).[1] Efforts were made by Dr. Reich and other officials to accommodate petitioner, but he con-

[1] "Reich Aff." refers to the affidavit filed by Dr. Reich in the district court.

tinued to have problems reporting for duty at the required times and places (Reich Aff., Exh. R). In July 1976, petitioner agreed to be transferred from the South Carolina clinic to a public health facility in Tchula, Mississippi. However, petitioner absented himself without leave from the South Carolina clinic prior to receiving his transfer orders to Mississippi (Reich Aff., Exh. W). A declaration to that effect appears in the central records of the Public Health Service in Rockville, Maryland (Pet. Supp. App. 3). A week later, when petitioner reported to the clinic, his absence without leave was terminated and he was restored to duty. It has been petitioner's position throughout this litigation that he was never absent without leave (AWOL) (Pet. Supp. App. 3). While stationed at the Mississippi clinic, petitioner continued to have problems reporting to work on time. Additionally, his Variable Incentive Pay Agreement was cancelled as a result of the serious deterioration of his professional performance (Reich Aff. 4).

In the fall of 1976, petitioner wrote to Dr. Reich, objecting to his having been reported AWOL. After reviewing all pertinent documents and talking to petitioner's immediate supervisors, Dr. Reich determined that the records surrounding the reported AWOL were accurate and so advised petitioner. Dr. Reich also admonished petitioner to improve his attitude and to change his unwillingness to abide by the rules and regulations governing the conduct of a commissioned officer (Reich Aff., Exh. CC).

In early 1977, petitioner was transferred from Tchula, Mississippi, to a clinic in MacClenny, Florida, where he remained until his termination as a commissioned officer. Following the termination, Dr. Reich was contacted by officials of the Department of Family Medicine at the East Carolina Medical School, who requested a job reference regarding petitioner. Sub-

sequently, Dr. Reich, during a telephone conversation, indicated the prolonged negative experience he had had concerning petitioner's obedience to rules and regulations. Dr. Reich further stated that petitioner was AWOL on one occasion (Pet. Supp. App. 4). Pursuant to the medical school's request, Dr. Reich sent a brief letter memorializing this job recommendation (Pet. App. B). That letter was subsequently placed in Dr. Reich's reading file and a regional programmatic file (Pet. Supp. App. 9). No copy of the letter was ever placed in petitioner's personnel file maintained at the headquarters of the Public Health Service in Rockville. The offer of employment issued by the medical school to petitioner was later withdrawn because of various misrepresentations in petitioner's application (Reich Aff., Exh. II).

2. On February 14, 1978, petitioner brought this action in the United States District Court for the Northern District of Georgia against the Department of Health and Human Services and Dr. Reich, seeking injunctive relief and damages for defamation and violation of the Privacy Act of 1974, 5 U.S.C. 552a. The complaint alleged that certain information contained in the records of the Public Health Service is "inaccurate, incomplete, false, and misleading" (Count I); that the Department, through Dr. Reich's telephone conversation and letter, improperly released information concerning petitioner from a "system of records" (Count II); and, in a pendent claim, that Dr. Reich defamed petitioner (Count III) (Pet. Supp. App. 1, 7–8). This petition for a writ of certiorari concerns only the second count.[2] As to that count, the district court granted the government's motion for summary judgment, holding that the disclosures by Dr. Reich fell outside the scope of the Privacy Act (*id.* at 1–16).

[2]On September 27, 1979, the district court denied the government's motion for summary judgment on Count I, finding

The district court concluded that because Dr. Reich's letter to the medical school was not itself a record contained in a "system of records," as defined by the Privacy Act, the sending of the letter, standing alone, did not violate the Act. The court also concluded that Dr. Reich's disclosures of the AWOL information in the letter and the earlier telephone conversation did not violate the Act because, although that material was also contained in the "system of records" maintained by the Department in Rockville, the information included in the letter and telephone call "simply did not emanate" from the filing system in Rockville; instead, it was "based on knowledge obtained from other Public Health Service employees working with [petitioner]" (Pet. Supp. App. 14, 10). In the latter connection, the court noted that for a disclosure to be barred by the Privacy Act, "there must have initially been a retrieval from the system of records which was at some point a source of the information" (*id.* at 13).

The court of appeals affirmed by memorandum order (Pet. App. A).

ARGUMENT

The lower courts correctly concluded that the disclosures in this case were not governed by the Privacy Act. There is no conflict of decisions on the legal issues presented, and further review by this Court is unwarranted.

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that a genuine issue of material fact remained to be resolved. The court granted Dr. Reich's motion for summary judgment on Count III (Pet. Supp. App. 15–16), and no appeal was taken from that order. Subsequently, petitoner filed a motion for entry of judgment on Count II. The parties then entered into a stipulation to dismiss Count I, which was approved under Fed. R. Civ. P. 41(a)(1)(ii). The district court thereafter entered final judgment in favor of the government, because the only remaining issue, under Count II, had already been resolved in favor of the government.

The Privacy Act provides that "[n]o agency shall disclose any record which is contained in a system of records * * * except * * * with the prior written consent of the individual to whom the record pertains * * *." 5 U.S.C. 552a(b). A "record" is defined to mean "any item, collection, or grouping of information about an individual that is maintained by an agency." 5 U.S.C. 552a(a)(4). A "system of records" is defined to mean "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. 552a(a)(5). Therefore, unless an item of information about a person is contained in a "system of records" maintained by the agency, prior permission to disclose that information is not required under the Act.

The only "system of records" involved here was petitioner's personnel file maintained at the Public Health Service's central office in Rockville, Maryland. It is undisputed that Dr. Reich's letter to the East Carolina Medical School was not integrated into that filing system. The letter was placed only in Dr. Reich's reading file, which is maintained by sequential dates of the letters therein, and in the regional programmatic files, which are organized by subject matter. Because information is not retrieved from either file by use of an individual's "name" or "other identifying particular" assigned to him, neither file is a "system of records" within the meaning of the Act. 5 U.S.C. 552a(a)(5). Thus, disclosure of Dr. Reich's letter itself was not governed by the strictures of the Privacy Act, because that document was not contained in a "system of records" within the meaning of the Act. Cf. *Smiertka* v. *United States Dep't of Treasury*, 447 F. Supp. 221, 228–229 (D.D.C. 1978), remanded, 604 F.2d 698 (D.C. Cir. 1979).

Nor was the Privacy Act violated by disclosure of the information contained in the letter or the preceding telephone conversation. Dr. Reich did not have custody of the system of records in Rockville in which the AWOL information was contained. Although he knew of petitioner's work history, he did not prepare the document that was placed in petitioner's personnel file. The district court further found (Pet. Supp. App. 15) that Dr. Reich had no knowledge of the precise contents of petitioner's personnel file. Thus, there is no indication in the record that the information disclosed in the telephone conversation and subsequent letter was drawn from a system of records.

Petitioner argues, however (Pet. 11), that the district court erred in holding that the Privacy Act's prohibition against disclosure applies only to information that first was retrieved from a system of records. According to petitioner, where the information to be disclosed also happens to be contained in a system of records maintained by the agency and the agency employee responsible for the disclosure knows (or should know) that it is contained in the system,[3] the Privacy Act's prohibition against disclosure applies even though the employee does not rely on the system of records as the *source* of the information. This argument was properly rejected by the courts below.

The Privacy Act does not proscribe the disclosure of information, as such; it proscribes the disclosure of "any *record* which is contained in a system of *records*," without the individual's consent. 5 U.S.C. 552a(b) (emphasis added). Use of the term "record" demonstrates that the disclosure must be from the system of which the released record is a part.

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[3] Petitioner maintains (Pet. 13–17) that Dr. Reich knew that the AWOL information was contained in petitioner's personnel file in Rockville, but the district court found (Pet. Supp. App. 15) that Dr. Reich did not know the precise contents of that file.

In addition, the Privacy Act defines the term "system of records" as a collection of records from which information "is retrieved" by the name of the person or other identifying symbol. 5 U.S.C. 552a(a)(5). This, too, indicates that it is the retrieval of information from the system and its subsequent disclosure to which the prohibition in 5 U.S.C. 552a(b) is addressed. Therefore, mere incorporation of personal information into a system of records, without subsequent retrieval, will not invoke application of the statutory proscription against disclosure.

The guidelines implementing the Privacy Act, issued by the Office of Management and Budget in 1975, also support the district court's holding. They provide that a disclosure subject to 5 U.S.C. 552a(b) "may be either the transfer of a record or the granting of access to a record." 40 Fed. Reg. 28953. Use of the term "transfer" and "access," as well as "record," suggests that the disclosure must be from the system of records.

Finally, as stated in Congress' findings in the Privacy Act itself, the statute is principally concerned with protection of the privacy of persons from the government's use of sophisticated information systems, which have "greatly magnified the harm to individual privacy" by their collection and disclosure of personal information. Pub. L. No. 93-579, Section 2(a)(2), 88 Stat. 1896. The congressional findings further note "the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered *by the misuse of certain information systems.*" Section 2(a)(3) (emphasis added). Dr. Reich based his job reference letter on his personal knowledge and on communications with other officials in the Public Health Service—the sources on which employers everywhere rely in such matters—not on retrievals from a sophisti-

cated information system. And there is no suggestion that he "misused" any information system.[4]

Petitioner's suggested test—"whether the person responsible for the disclosure knew or should have known that he was imparting information contained in agency records" (Pet. 18), whether or not the person actually obtained the information from the system—would place an unrealistic burden on the government. As noted by the district court (Pet. Supp. App. 12), federal officials are called on daily to make numerous statements concerning persons who might have personal information contained in a system of records somewhere within the agency. Congress could not have intended such officials to have a "pansophic recall concerning every record within every system of records within" their agency (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1980

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[4] In the Questions Presented (Pet. I), petitioner appears to challenge the district court's finding that Dr. Reich did not retrieve information from the Public Health Service's system of records. He does not argue this point in the body of the petition, however. In any event, there is evidence in the record that Dr. Reich relied on personal knowledge of petitioner's work record and the knowledge of other officials who communicated with Dr. Reich (Reich Aff. 6). This evidence was uncontradicted by petitioner (Pet. Supp. App. 10).

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